for redress of grievances. "The right to access to the courts is indeed but one aspect of the right of petition." *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). This right of access to the courts has also been described as founded in the Due Process Clause of the Fourteenth Amendment. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002).

Here the property owner has never had an evidentiary hearing in court. Instead, the City dismissed the pending criminal action, then acted as both prosecutor and judge in declaring the property to be in violation of City ordinances. The City made its own administrative determination, and now seeks to enforce, through the vehicle of a motion for judgment on the pleadings, that administrative action.

The procedure permitted here deprives the property owner of his First Amendment right to access to the courts and his Fourteenth Amendment right to due process of law.

It also inhibits the right of property owners to contest in court an administrative decision they think is illegal or overbroad. Here the City was able to use its *res judicata* ploy only because the property owner had filed a petition for administrative mandate. Had the property owner not done so, the City would have been limited to seeking enforcement of its zoning ordinance through traditional court action, in which case the property owner could have presented evidence to the court. But if a property owner elects to forego his remedy of administrative mandate, he also runs the risk of a court ruling that he has waived his right to contest the City Council's resolution.

CONCLUSION

Unbridled discretion in the hands of a government agency is the antithesis of what the Framers had in mind when they adopted the Constitution.

The court should grant certiorari to restore the balance of power be ween the government and the People, by requiring that a property owner be given a true day in court before the government can place restrictions on the use of his property.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

RASH B. GHOSH, **Plaintiff, Cross-Defendant, and Appellant,** **v.** **CITY OF BERKELEY,** **Defendant, Cross-Complainant, and Respondent**	**A106858** **(Alameda County Super. Ct. No. 2002-43750)**

(Filed Apr 19, 2005)

Appellant Rash B. Ghosh appeals from a ruling of the trial court, granting an injunction that orders him to remove illegally constructed alterations to his property. The City Council and Zoning Adjustments Board of the City of Berkeley (City) passed resolutions declaring certain residential property owned by appellant to be a public nuisance, because he had made alterations to the property without the necessary building permits, including adding an illegal living unit to the attic, an illegal second story balcony, and encroachments onto the yard setback

near the edge of the property. Ghosh challenged the resolutions by filing a petition for writ of administrative mandate. The trial court denied the writ. In a prior appeal, Ghosh claimed the resolutions were not supported by substantial evidence, the City Council and Zoning Adjustments Board were equitably estopped from declaring his property to be a public nuisance, and the City Council violated his due process rights by refusing his request for a continuance. We rejected those arguments in December 2003, and affirmed the judgment. (Case No. A100924.)

The matter then returned to the trial court. The trial court granted the City's motion for judgment on the pleadings, in light of our appellate ruling, and issued an injunction against Ghosh's continued maintenance of the public nuisance at his property.

Ghosh now appeals again, contending that (1) issuance of the injunction by means of a motion for judgment on the pleadings was procedurally improper; (2) the facts do not show a public nuisance as to the illegal living unit he added to the attic; (3) the injunction is overbroad in remedying the violations in the attic; and (4) his due process rights were violated. We reject these contentions and affirm.

I. FACTS AND PROCEDURAL HISTORY

We are very familiar with the facts of this long-running litigation from the previous appeal. Ghosh owns a two-unit residential duplex, 2507-2509 McGee Street, located at the intersection of McGee Avenue and Dwight Way in Berkeley. Ghosh began making renovations to the property after he acquired it in 1991. Over the following years, Ghosh submitted plans to the City for several

different projects he had planned, and obtained City permits for some, but not all, of the contemplated work.

In the mid-1990's, the City began receiving complaints from neighbors and building inspectors about appellant's construction and alterations at the McGee Street property. When city building officials inspected Ghosh's property, they found he had made numerous alterations without necessary permits, and had exceeded the scope of the work that had been authorized. In particular, an illegal third floor living unit had been added to the duplex in the attic area, as well as a second floor balcony or deck, which encroached on the required yard setback on McGee Street. There were no issued City permits for these alterations.

City officials notified Ghosh that he needed to obtain three use permits and two variances in order to legalize the changes he had made. Ghosh however took the position that all the work he performed had been pursuant to permits.

Ghosh and city officials tried to negotiate a resolution to the dispute. When they were unsuccessful, the Berkeley Zoning Adjustments Board initiated proceedings to declare Ghosh's property a public nuisance. The Zoning Adjustments Board conducted a public hearing. After hearing testimony from interested parties, and after considering a report prepared by staff, the Zoning Adjustments Board adopted a resolution declaring Ghosh's property a public nuisance.

Ghosh appealed that decision to the Berkeley City Council. A hearing was originally set for September 25, 2001; however, Ghosh asked for a continuance so he could hire an attorney and gather his evidence. The City Council granted the request and continued the hearing to October

30, 2001. Ghosh failed to appear at the continued hearing. The City Council conducted a public hearing and took the matter under submission and on November 27, 2001, it adopted a resolution declaring Ghosh's property a public nuisance.

Ghosh challenged both resolutions by filing a petition for a writ of administrative mandate. He argued the work he had performed had been authorized. The City argued it was entitled to prevail, and filed a cross-complaint requesting injunctive relief. Following a hearing at which the record was independently reviewed, the trial court agreed with the City, ruling that its resolutions were supported by the record.

Ghosh then appealed, and in December 2003 we affirmed the judgment, in an opinion written by Presiding Justice Jones. (Case No. A100924.)

The matter then returned to the trial court for further proceedings on the City's request for injunctive relief, in light of our ruling. The City filed a motion for judgment on the pleadings, and after another hearing, the trial court granted the motion, issuing an injunction that barred Ghosh from maintaining the public nuisance on his property. The injunction requires that Ghosh undo the illegal work he performed on the property. This included removing the illegal second floor balcony, and restoring the illegal third unit to its former status as an uninhabited attic space, by lowering the ceiling to a height of not more five feet eleven inches, removing plumbing fixtures, and covering windows.

II. DISCUSSION

A. STANDARD OF REVIEW

The normal standard of review as to an order issuing an injunction calls for review under an abuse of discretion. "It is the general rule in this state that while the right to injunctive relief under proper circumstances is well established, its issuance is largely discretionary with the court and depends upon a consideration of all the equities between the parties. No hard and fast rule can be adopted which will fit all cases and hence each must be determined upon its own peculiar facts [citation]." (*Pahl v. Ribero* (1961) 193 Cal.App.2d 154, 161.) "The issuance of an injunctive decree is subject to reversal on appeal only if a clear abuse of discretion is evident. (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 952.)" (*Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1056 (*Health Maintenance*); *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912 (*Shapiro*).) By granting the injunction, the trial court necessarily determined that the City had prevailed on its claims against appellant, and that equitable relief was appropriate. (See *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293; Code Civ. Proc., § 526, subd. (a)(1).)

In the proceedings we reviewed in the prior appeal (case No. 100924), the trial court ruled as a matter of law that the Zoning Board and City Council resolutions were valid. In affirming the trial court, we found the ruling to be supported by substantial evidence. By granting the City's motion for judgment on the pleadings in the present matter, the trial court essentially ruled as a matter of law that injunctive relief was an appropriate remedy. As to any pure issues of law arising from the lower court's ruling on

this motion, we may exercise de novo review. (See *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187.)

A motion for judgment on the pleadings is not necessarily limited to consideration of the bare pleadings themselves: "Matters which may be judicially noticed may also be considered. [Citation.]" (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1104.) "We independently review a judgment on the pleadings, and review the judgment, not the court's rationale." (*Harris v. Grimes* (2002) 104 Cal.App.4th 180, 185.)

B. ISSUANCE OF THE INJUNCTION WAS PROPER.

1. The Motion for Judgment on the Pleadings by the City

Appellant first contends that the City's choice of a motion for judgment on the pleadings to obtain injunctive relief was procedurally improper, and he suggests the City should have filed a motion for summary judgment instead. However, the City points out that the trial court could take judicial notice of our appellate decision on a motion for judgment on the pleadings, and that our decision in the previous appeal in this case was res judicata as to all the issues that could have been raised in the earlier appeal, which includes all the facts necessary for the issuance of the injunction.

We first examine the res judicata effect of the prior litigation and judgment. The doctrine of res judicata has two aspects. "In its narrowest form, res judicata '"precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding]. "'(*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58

Cal.2d 601, 604 (*Teitelbaum*), italics added, quoting *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 (*Bernhard*).) But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an *issue* "'"necessarily decided in [prior] litigation [may be] conclusively determined *as* [*against*] *the parties* [*thereto*] *or their privies* . . . in a subsequent lawsuit on a *different* cause of action."' (*Teitelbaum* [ ], *supra*, at p. 604, italics added.) [¶] Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [ ]; *Teitelbaum* [ ], *supra*, 58 Cal.2d 601, 604; *Bernhard, supra*, 19 Cal.2d 807, 810-813.)" (*Van[illegible]berg v. Superior Court* (1999) 21 Cal.4th 815, 828, italics in original.)

"' . . . If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]'" (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)"

Here, appellant appealed from a judgment concerning the same matter, i.e., the public nuisance found by the City Council to exist on appellant's property. In the course of deciding that appeal, we extensively discussed and rejected appellant's contentions regarding the illegal attic conversion: "Turning first to the Zoning Adjustments Board,—the Board declared Ghosh's property a public nuisance based on four findings. The Board said Ghosh had violated four different sections of the Berkeley Municipal Code when he 'construct[ed] . . . a major residential addition of approximately 963 square feet without a Use Permit,' 'extend[ed] . . . an existing non-conforming rear yard setback of 4'6" where 20 feet is required,' 'reduc[ed] . . . the McGee street side yard setback from an existing (and non-conforming) 6 feet to 1 foot, where 10 feet is required without a[v]ariance,' and 'increas[ed] [his] lot coverage from the existing (and non-conforming) 59% lot coverage to 67% lot coverage, where 45% is allowed without a[v]ariance. . . .' [¶] Each of these findings is supported by evidence in the administrative record. Prior to declaring Ghosh's property to be a public nuisance, the staff of the Zoning Adjustments Board prepared a detailed report describing Ghosh's property. That report identified the same four factors cited by the Board in support of its decision. Specifically, the report described the permits Ghosh had obtained, why those permits were inadequate, and the ways in which Ghosh's property violated Berkeley's municipal code. The staff report was itself supported by plot maps and building diagrams, correspondence to and from Ghosh about the problems that had been identified, and an official citation that had been issued to Ghosh. It has long been settled that an administrative agency may make a decision based on a staff report. (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d

852, 866.) Clearly, the Zoning Adjustment Board's decision to declare Ghosh's property a public nuisance is supported by substantial evidence." (Footnote omitted.)

We also discussed the illegal attic conversion in greater detail: "The City Council's next finding was that it had never approved an attic level or third floor for Ghosh's property. This finding was supported by language in the City Council staff report that states, 'Ghosh submitted an application for an Administrative Use Permit . . . to legalize a roof height increase exceeding the 28-foot average height limit. He did pay the then required fee of $288. However, upon review of this application and the building, [s]taff determined that . . . Ghosh had constructed an entire new third floor and second floor balcony. These alterations were not only beyond the scope of the previous building permits, but were also beyond the scope of the [Administrative Use Permit] for which . . . Ghosh had applied.' [¶] The City Council found that city officials had 'communicated to . . . Ghosh, in letters, notices, and meetings, which portions of the building footprint and profile would have to be removed so as to comply with the Zoning Ordinance.' This finding is supported by evidence in the staff reports and supporting documentation that shows city officials told Ghosh repeatedly in letters, official notices and meetings, that his property did not comply with the local ordinances, and told him how he could bring his property into compliance."

We therefore rejected appellant's appellate claims, which sought, among other things, to legalize the attic conversion by disputing the City's characterization of it as an illegal alteration without the necessary permits, constituting a public nuisance. Upon the issuance of our previous opinion, the judgment denying appellant's application for a

writ of mandate became final, and that final judgment barred relitigation of all legal issues relating to whether this same attic conversion constituted a public nuisance. (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898.)

Appellant however argues that, since a motion for judgment on the pleadings generally accepts as true the pleadings made by the opposing party (see *Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1379), the city's motion in this case was improper, because he had controverted some of the allegations of the City's cross-complaint for injunctive relief in his answer. Appellant's argument ignores the fact that our prior decision had rejected on the merits his arguments as to all the legal issues he raised in that appeal. Among the issues resolved by this court was whether the illegal living unit in the attic constituted a public nuisance, and thus the prior judgment foreclosed any other arguments to the contrary regarding the attic's status as a public nuisance. Because the trial court could take judicial notice of our prior decision on a motion for judgment on the pleadings, the issuance of the injunction was procedurally justified. (See *Barker v. Hull* (1987) 191 Cal.App.3d 221, 224-225 [Per Newsom, J., the granting of a motion for judgment on the pleadings was proper, where a prior ruling collaterally estopped the present claims.].)

Even if the City was required to proceed instead by way of a motion for summary judgment, rather than a motion for judgment on the pleadings, the asserted procedural error would have been harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant does not identify any arguments or factual disputes which were foreclosed by the fact that a motion for judgment on the

pleadings, rather than a summary judgment motion, was pursued by the City. As we discuss below, his arguments are substantively without merit in any event.

2. The Illegal Living Unit in the Attic was an Abatable Nuisance.

Appellant does not now specifically dispute the grant of injunctive relief as to the illegal second floor balcony or the illegal side yard encroachment. Instead, he continues to maintain that the illegal living unit in his attic was not a *public* nuisance, and therefore subject to abatement by a preliminary injunction. We believe appellant's arguments are foreclosed by the res judicata effect of our prior decision, as discussed above. Nonetheless, we elect to address his arguments on the merits.

Appellant's arguments are at variance with authority from our own Appellate District, as well as others, which hold that any violation of a local zoning or planning code results in a nuisance that may be abated by an injunction. (See *City and County of San Francisco v. Padilla* (1972) 23 Cal.App.3d 388, 401 (*Padilla*), and cases cited therein; *City of Santa Clara v. Paris* (1977) 76 Cal.App.3d 338, 341-342.) It is the illegal nature of the condition on the property, not its private or public nature under the antiquated common law of nuisance, that allows the use of injunctive relief as a remedy. (*Padilla, supra*, at p. 401; *City of Santa Clara v. Paris, supra*, at pp. 341-342.)

It may be true, as appellant suggests, that there are two species of nuisance in California, private and public. A public nuisance is one that affects a considerable number of people, and any other nuisance is private. (Civ. Code, §§ 3480, 3481.) However, such distinctions are irrelevant

in this context, because either type of nuisance is subject to an action for abatement, including injunctive relief. (Civ. Code, §§ 3491; 3501; Code of Civ. Proc., § 731; see *In re Englebrecht* (1998) 67 Cal.App.4th 486, 492; *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 245, fn. 5.)

The record demonstrates that appellant constructed an illegal living unit in the attic, and he has refused for many years to remedy the illegal condition. The addition of an illegal living unit may reasonably be expected to impact others, including neighbors, and it therefore may constitute an illegal nuisance, as to which injunctive relief as a remedy was appropriate. (See *Padilla, supra*, 23 Cal.App.3d at p. 401.)

3. The Injunction is not Overbroad.

Appellant also claims the injunction is overbroad in remedying the illegal conditions created by the existence of the living unit in the attic. According to appellant, the injunction should have ordered him to lower the ceiling in the attic somewhat, to a height of five feet eleven inches (as the injunction in fact did), and he should not have been ordered to take other similar actions to remedy the illegality and prevent occupation of the unit, such as requiring him to close off the windows in the unit, remove the plumbing fixtures, and so on.

In reviewing the language of the injunction, we do not exercise de novo review, but apply an abuse of discretion standard. (*Health Maintenance, supra*, 202 Cal.App.3d at pp. 1055-1056; see also *Shapiro, supra*, 96 Cal.App.4th at p. 912.) We are mindful of the fact that a trial court has broad authority to grant injunctive relief, and make all necessary orders to prevent a continuation of illegal

conduct. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540-542 (*Hewlett*).)

The purpose of the injunction, of course, was to prevent the attic to be used as an illegal living space, after appellant converted it into an apartment and refused to desist from such illegal use. The injunction ordered the reconversion of the illegal living space back to an attic that would not be suitable for habitation, even by persons who could live in an area with a ceiling at the height of five feet eleven inches. The injunction directs, in specific detail, the steps necessary to reconvert the apartment into an uninhabited attic, such as existed before the illegality shown to exist in this case. (See *Padilla*, *supra*, 23 Cal.App.3d at p. 401.)

Here, the trial court simply enjoined appellant to reverse the conversion of the attic into a third living unit, and restore it to the attic storage area status it held before appellant's illegal building activities. No abuse of discretion appears in this regard. (*Health Maintenance*, *supra*, 202 Cal.App.3d at pp. 1055-1056.)

4. Appellant's Constitutional Rights were not Violated.

Finally, appellant contends that his due process rights, and rights of access to the courts, were violated by the issuance of the injunction. Although his contentions are not completely clear, appellant seems to argue that his rights were violated because the City did not pursue this matter as a criminal proceeding, or did not file a separate new action seeking injunctive relief. Appellant argues: "The traditional means to enforce a zoning ordinance is through a criminal proceeding or through an action for

declaratory relief and injunction." He also complains that the City's administrative decision regarding the existence of a public nuisance as a result of a zoning violation was upheld by the trial court, and by this court on appeal, without affording him yet another opportunity to contest factual issues related to the finding of a public nuisance as a result of the illegal living unit in the attic.

As to those contentions we understand appellant to be making, the record clearly demonstrates that he was afforded ample due process and access to the courts over the past several years, as he resisted all legal efforts to force him to comply with the City zoning laws. Appellant has had multiple hearings before the Zoning Board and before the City Council, in the trial court, and then on appeal. He received yet another hearing before the trial court issued the injunction in issue. It is well established that the initial decisions of administrative bodies, such as the Zoning Board or City Council, may be reviewed by the courts using the independent judgment test, as was used here, or the more deferential standard of substantial evidence. These procedures comport with due process. (See, e.g., *Bixby v. Pierno* (1971) 4 Cal.3d 130, 140-144 & fns. 6 & 10.) We perceive no due process violation, or denial of access to the courts.[1]

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[1] To the extent appellant seeks to vaguely raise any other, unspecified arguments, it is well established that points not supported by citations to authority and coherent reasoned argument are treated as waived on appeal. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 559; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

At bottom, appellant's arguments were barred by res judicata, and were substantively without merit. He has not shown any error, or identified any cognizable prejudice from the method used by the City to obtain injunctive relief to abate the illegal conditions on his property. At some point, procedural quibbling must end, and an order must issue requiring that the law be obeyed. (See *Hewlett, supra*, 54 Cal.App.4th at p. 543.) This litigation long ago reached that point.

III. DISPOSITION

The judgment is affirmed.

STEVENS, J.

We Concur.

JONES, P.J.

SIMONS, J.

APPENDIX B

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

RASH B. GHOSH, Petitioner, vs. SHIRLEY DEAN, ET AL., Respondents.	No. 2002-043750 **JUDGMENT ON CROSS-COMPLAINT FOR ABATEMENT OF PUBLIC NUISANCE** (Filed Apr. 8, 2004)
CITY OF BERKELEY, Cross-Complainant, vs. RASH B. GHOSH and DOES 1-100, Cross-Defendants.	

The Court having granted the City of Berkeley's motion for judgment on the pleadings,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment shall enter in favor of the City of

Berkeley and against Rash B. Ghosh on the City's Cross-Complaint for Abatement of Public Nuisance.

Dated: **APR 8 2004**

/s/ James A. Richman
JAMES A. RICHMAN
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

RASH B. GHOSH, Petitioner, vs. SHIRLEY DEAN, ET AL., Respondents.	No. 2002-043750 **INJUNCTION FOR ABATEMENT OF PUBLIC NUISANCE** (Filed Apr. 8, 2004)
CITY OF BERKELEY, Cross-Complainant, vs. RASH B. GHOSH and DOES 1-100, Cross-Defendants.	

The Court having granted the City of Berkeley's motion for judgment on the pleadings as to its Cross-Complaint, and entered Judgment thereon,

IT IS ORDERED that Cross-Defendant Rash B. Ghosh, his agents, employees, representatives, and all

persons acting in concert or participating with him (hereinafter "defendant"), shall forthwith [~~take the following actions to~~ /s/ JAR] abate the public nuisance at 2507-09 McGee Street, in Berkeley, California, in full compliance with City of Berkeley City Council Resolution No. 61,350-N.S., which is attached hereto as exhibit A and incorporated by reference.

IT IS FURTHER ORDERED that all of said work shall be performed only pursuant to permit, if required.

IT IS FURTHER AND FINALLY ORDERED that the Court will retain jurisdiction in this matter to ensure full compliance with this Injunction and to order further relief, including appointment of a receiver, if appropriate. Accordingly, the parties shall appear before the Court on July 30, 2004, at 9:00 a.m., for a compliance hearing.

Dated: **APR 8 2004**

/s/ James A. Richman
JAMES A. RICHMAN
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

RESOLUTION NO. 61,350-N.S.

DECLARING THE PROPERTY AT 2507-09 MCGEE AVENUE A PUBLIC NUISANCE AND ORDERING ITS ABATEMENT

WHEREAS, on or about September 3, 1999, during an inspection of 2507-09 McGee Avenue, City staff discovered an illegal addition measuring 963 square feet and further determined that said addition was substandard under Section 202 of the Uniform Housing Code as adopted by

the City of Berkeley (see BMC Chapters 19.40 and 19.44); and

WHEREAS, the illegal addition consists of a substandard third floor that has been added to the existing duplex, and an illegal and substandard second floor balcony; and

WHEREAS, no building permits, Use Permit or Variances, which were legally required for this construction, were ever obtained; and

WHEREAS, on September 3, 1999 the City sent the owner, Dr. Rash B. Ghosh, a Notice and Order to Abate, which outlined the violations and the necessary corrections, and gave him time to make those corrections; and

WHEREAS, Dr. Ghosh failed to correct the violations; and

WHEREAS, Dr. Ghosh was issued Citation # Z10329 issued on February 4, 2000 by the Current Planning Division for the various Zoning Ordinance violations which are the subject of this resolution; and

WHEREAS, after trial commenced the Court ordered the parties to attempt to settle the case; and

WHEREAS, lengthy negotiations did not result in a settlement; and

WHEREAS, Dr. Ghosh was represented by counsel at all times during the litigation;

WHEREAS, the People ultimately dismissed the charges in light of the [sic] these nuisance proceedings; and

WHEREAS, Dr. Ghosh has failed to secure any Use Permit or variance approval in response to any of the violations outlined above; and

WHEREAS, on January 25, 2001 the Zoning Adjustments Board adopted a resolution to initiate public nuisance proceedings under Chapter 23B.64 of the Zoning Ordinance; and

WHEREAS, the Zoning Adjustments Board found, after conducting public hearings on March 8, 2001 and June 14, 2001 that certain alterations at 2507-09 McGee constitute a public nuisance, as set forth below:

- construction of a major residential addition of approximately 963 square feet without a Use permit, in violation of BMC §23D.78.030;
- extension of an existing non-conforming rear yard setback of 4'6" where 20 feet is required, without a Use Permit, in violation of BMC §23C.04.070.B;
- reduction of the McGee street side yard setback from an existing (and non-conforming) 6 feet to 1 foot, where 10 feet is required without a Variance, in violation of BMC §23D.28.070.D; and
- increase in lot coverage from the existing (and non-conforming) 59% lot coverage to 67% lot coverage, where 45% is allowed without a Variance, in violation of BMC §23D.28.070.E.

WHEREAS, on June 14, 2001 the Zoning Adjustments Board found that Dr. Ghosh has had repeated opportunities to remedy the above-mentioned violations but has consistently declined to do so and declared the property to be a public nuisance and ordered that the illegal construction be remedied; and

WHEREAS, on July 15, 2001, Dr. Ghosh appealed the matter to the City Council; and

WHEREAS, on the matter was noticed for a public hearing before the Council on September 25, 2001; and

WHEREAS shortly before the hearing Dr. Ghosh requested a 90-day continuance in order to obtain legal representation and the hearing was continued to October 30, 2001; and

WHEREAS Dr. Ghosh was present at the public hearing of September 25, 2001 and was aware of the continuance to October 30, 2001; and

WHEREAS on October 13, 2001 Dr. Ghosh requested an additional continuance to a December Council meeting date; and

WHEREAS on October 30, 2001 the Council denied that additional continuance request because he had had ample opportunity to retain counsel and was aware of the Council's previous continuance; and

WHEREAS, in his appeal, Dr. Ghosh raised issues in which the Council found in each case the following:

- In May 2001, Dr. Ghosh filed a complaint with the U.S. Department of Housing and Urban Development (HUD) alleging that the City was discriminating against him in these proceedings on the basis of his national origin/ancestry and race. The Council has reviewed the evidence available to it, including the evidence submitted by Dr. Ghosh, and finds no basis for Dr. Ghosh's allegations, and further that the City's actions in this matter to date have been supported by evidence of violations of the Zoning Ordinance.

- Dr. Ghosh claims he secured permits for all constructed building changes, that the Building Division's case was 'dropped' because the building permit file is missing, and the building inspector who had issued the stop work orders left the City because of the City's unfair handling of the case. The Council finds that although Dr. Ghosh applied for a series of building permits between 1991-1998, his construction exceeded that authorized in the permitted plans, that the overall record of non-compliance is clear, and that the former Building Inspector did not leave City employment over the City's alleged unfair handling of Dr. Ghosh's case", but to pursue another employment opportunity.

- Dr. Ghosh claims that the present residents would be displaced by the corrections ordered by the City. The Council finds that the ordered abatement would not require long-term displacement of residents, who were apparently not displaced by the illegal construction that gave rise to these proceedings, and that the City is pursuing this public nuisance action to protect the health and safety of existing and future building residents, as well as the welfare of the neighborhood.

- Dr. Ghosh claims that the City reneged on Court-negotiated settlement agreement, but the Council finds that no agreement was reached and that Dr. Ghosh's allegation that the City reneged on an agreement is false.

- Dr Ghosh claims that he applied for and paid fees for a permit for the construction. The Council finds that while Dr. Ghosh did submit an application and permit fee, he was never granted the permit in question, and in any case constructed

alterations beyond the scope of the permit for which he had applied.

- Dr. Ghosh claims that the City approved plans for the attic. The Council finds that the plans in question did not show any approval of an attic level or third floor.

- Dr. Ghosh claims he was unclear as to what changes were needed to achieve compliance but the Council finds that the City has clearly communicated to Dr. Ghosh, in letters, notices, and meetings, which portions of the building footprint and profile would have to be removed so as to comply with the Zoning Ordinance.

- Dr. Ghosh claims that the construction met the 28 foot height limit, and that the plans were approved several times by Building Inspectors. The Council finds that the alterations made by Dr. Ghosh *do not* violate the 28 foot height limit, and that these proceedings are not based on any alleged violation of that height limit. Rather, the Council finds that although Dr. Ghosh applied for a series of building permits between 1991-1998, his construction exceeded that authorized in the permitted plans, and, further, that he was issued a total of six stop work orders for building code violations, yet he continued to construct building changes until he was issued a citation.

- Dr. Ghosh claims that two legal cases have been dismissed during a re-trial. The Council finds that City Staff issued citations to Dr. Ghosh charging him with violating each of the five Zoning Ordinance provisions referred to above, and with violations of the Building Code, and that after the trial began and after court-ordered settlement negotiations failed, the court, with the

stipulation of the parties, declared a mistrial due to the lapse of time. The Council further finds that the People thereafter voluntarily dismissed the criminal proceedings in the interest of justice due to these nuisance abatement proceedings, which by that time were underway.

WHEREAS, on October 30, 2001 the City Council conducted and closed the public hearing in this matter;

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley finds that the property at 2507-09 McGee Avenue is a public nuisance under Section 23B.64.020.B of the Zoning Ordinance for the reasons found by the Zoning Adjustments Board and set forth above.

BE IT FURTHER RESOLVED, pursuant to Section 23B.64.030, that Dr. Ghosh is ordered to take the following actions to abate the nuisance:

1. Eliminate the illegal "third story" of 2507-09 McGee Avenue in its entirety, convert it into an attic and bring the attic into conformance with the Zoning Ordinance. This includes, but is not limited to:

- lowering the roof so that it meets the north and south walls of the building at the level of the second floor ceiling;
- ensuring that the roof as rebuilt does not exceed an interior height of 5'11" at any point in the attic, measured from the floor to the bottom of the rafters or structural truss members, if any;
- removing the part of the third floor/attic which overhangs the front of the building facing McGee;

- closing in all window openings and removing headers and framing for windows in the third floor/attic;
- removing all water and gas plumbing fixtures, supply pipes, waste lines and vents which are located so as to serve the third floor/attic space, except to the extent that they are necessary to serve legally installed fixtures on the first or second floors;
- removing all interior partition walls in the third floor/attic;
- removing all cabinets, remove and [sic] electrical fixtures, wiring and panels in the third floor/attic, except that limited light fixtures to ensure the usability of the attic as a storage space may be permitted, subject to the approval of the Zoning Officer;
- removing the staircase leading to the third floor/attic and replacing it with a pull down stair.

2. Remove the illegal second floor addition of 2507-09 McGee Avenue that encroaches into the rear yard setback.

3. Remove the illegal second story balcony of 2507-09 McGee Avenue in its entirety; and

BE IT FURTHER AND FINALLY RESOLVED, pursuant to Section 23B.64.070, that the City shall be entitled to the recovery of costs associated with abating the declared nuisance.

The foregoing Resolution was adopted by the Berkeley City Council on November 27, 2001 by the following vote:

Ayes: Councilmembers Armstrong, Breland, Hawley, Maio, Olds, Shirek, Spring, Worthington and Mayor Dean

Noes: None.

Absent: None.

/s/ Shirley Dean
Shirley Dean, Mayor

Attest: /s/ Sherry M. Kelly
Sherry M. Kelly, City Clerk

APPENDIX C

Court of Appeal, First Appellate District, Division Five –
No. A106858
S134190

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RASH B. GHOSH, Plaintiff,
Cross-defendant and Appellant,

v.

CITY OF BERKELEY,
Defendant, Cross-complainant and Respondent.

(Filed Jun 09, 2005)

Petition for review DENIED.

Brown, J., was absent and did not participate.

/s/ George
Chief Justice

Supreme Court, U.S.
FILED
OCT 31 2005
OFFICE OF THE CLERK

No. 05-442

In The Supreme Court of the United States

RASH B. GHOSH,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

BRIEF IN OPPOSITION

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I

INTRODUCTION

Pursuant to Rule 15, Respondent City of Berkeley (hereafter "City") files this brief in opposition to the petition for writ of certiorari (hereafter "Pet.") by Rash B. Ghosh (hereafter "Ghosh"). The City will point out Ghosh's failure to cite any applicable authority in support of his position. The City will also explain that the Petition simply does not meet the threshold requirements for invoking Supreme Court jurisdiction on certiorari.

II

STATEMENT OF THE CASE

Ghosh owns a duplex in Berkeley, in which he lives. Over the years, he has constructed various illegal and unpermitted alterations. In the mid-1990s, in response to neighborhood complaints and referrals from City building inspectors, the City's Current Planning Division contacted Ghosh about these violations.

In April of 1998, City staff observed illegal construction at Ghosh's property (a new third floor and an extension of a second floor deck into a side yard), notified him of the illegal construction and informed him that he would need to submit applications for various permits in order to legalize it. He declined to submit the required applications.

After additional efforts extending through mid-2001 were unavailing, the City initiated administrative nuisance abatement proceedings, as authorized by its Zoning Ordinance. These proceedings, which involved noticed public hearings before the City's Zoning Adjustments

Board and City Council, culminated in November 2001 in a City Council determination that Ghosh's illegal alterations constituted a public nuisance and an order that he abate them.

Ghosh challenged this decision by filing a petition for writ of mandate, and the City filed an answer and cross-complaint for abatement of the public nuisance. Ghosh's petition was denied after a hearing. In so doing, the trial court used its independent judgment in evaluating whether a preponderance of the evidence in the administrative record supported the City Council's findings and decision.

Ghosh appealed the judgment denying his petition. In December 2003, in an unpublished opinion in case number A100924, the California Court of Appeal affirmed the judgment.

After the first appeal became final, the City filed a motion for judgment on the pleadings on its cross-complaint, on the ground that the matter was *res judicata*. The trial court granted the motion and entered judgment, and issued an injunction to abate the public nuisance at Ghosh's property, as previously ordered by the City Council. Ghosh again appealed.

In April 2005, the California Court of Appeal affirmed the judgment and injunction on the ground that the matter was *res judicata* (case number A106858). Ghosh's petition for review to the California Supreme Court was denied.

III

ARGUMENT OR REASON FOR DENYING THE PETITION: THE PETITION FAILS TO MEET THE THRESHOLD REQUIREMENTS FOR SEEKING CERTIORARI: THE COURTS IN THIS CASE HAVE NOT DENIED GHOSH DUE PROCESS BY APPLYING PRINCIPLES OF *RES JUDICATA*.

Supreme Court Rule 10 provides that certiorari is entirely discretionary and will be granted only for "compelling reasons." The Rule enumerates the character of the reasons that the Court will consider in evaluating a Petition for Writ of Certiorari. Ghosh tries to bring himself within the ambit of either subdivision (b) or (c), arguing that the California courts have denied him rights under both the First and Fourteenth Amendments. However he cites no authority from *any* court in support of his petition. He also fails to acknowledge that this alleged deprivation resulted from the court's concededly proper application of *res judicata*.

Ghosh contends that the Court of Appeal's decision upholding the Superior Court's injunction denied him his right to petition and due process because he is constitutionally entitled to continue to challenge the appropriateness of injunctive relief, no matter how many opportunities he has had to do so in administrative proceedings or in court proceedings reviewing an administrative decision.

He cites no authority for this proposition. Instead, he cites two decisions of this Court, and one federal appellate decision, none of which speak to the circumstances here except in the broadest of generalities. We do not quarrel that the rights to a jury trial and of access to the courts

are fundamental aspects of our jurisprudence. But that does not mean that every litigant, under every set of circumstances, is entitled to a jury or to litigate his case *ad infinitum*.[1]

Beacon Theaters v. Westover, 359 U.S. 500 (1959), is entirely inapposite, because it addressed the relative extent of legal and equitable jurisdiction as affected by the Declaratory Relief Act in litigation between private parties. Here, in contrast, the City accorded Ghosh due process before making its administrative determination that he had created a public nuisance and deciding how that nuisance should be abated.[2]

In fact, agencies are routinely given power to determine questions of fact, subject to judicial review. As this Court recognized almost 70 years ago,

> When the legislature appoints an agent to act within that sphere of legislative authority, it may

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[1] As the California Court of Appeal said, "At some point, procedural quibbling must end, and an order must issue requiring that the law be obeyed. . . . This litigation long ago reached that point." (Pet. App. 15.)

[2] *California Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) is even farther afield. It held that the right to petition protects those who ask the government to take action against their competitors from antitrust liability, but that protection does not extend to "sham" activities that do not truly seek governmental action, and instead seek to gain a competitive advantage.

Ghosh's citation to *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 83, 97 (D.C. Cir. 2002) is not even a makeweight. In the course of discussing whether Libya could invoke the due process clause to challenge personal jurisdiction over it in United States courts, the Circuit Court for the District of Columbia observed that "Private individuals have 'a constitutional right of access to the courts' . . . " It cannot be said that Ghosh has been denied access to the courts in his two appeals.

> endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. [Citations.] In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

(*St. Joseph Stock Yards Co. v. United States, et al.*, 298 U.S. 38, 51 [56 S.Ct. 720, 725-726, 80 L. Ed. 1033, 1041] (1936).)

Likewise in California,

> . . . where the legislature has by statute clothed an administrative officer with power to ascertain the facts . . . and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit . . . the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof.

(*McDonough v. Goodcell*, 13 Cal. 2d 741, 748 (1939); *see also*, 9 Witkin, California Proc., *Administrative Proceedings*, §122 (4th ed. 1997).)

The foundation of Ghosh's argument is his refusal to acknowledge the existence or effect of *res judicata* in this case. However, this Court has long recognized that *res judicata* may apply to administrative decisions.

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had

> an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

(United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) emphasis added.)

In fact, as the California Court of Appeal held in the first appeal, Ghosh had ample opportunity to present his case to the City's Zoning Adjustments Board and the City Council.[3] He also had the opportunity to present his objections to the injunction to the state court when he challenged the City Council's decision in the first appeal. He was entitled in that action to challenge all aspects of the City Council's nuisance declaration and abatement order, and he took advantage of that opportunity: he alleged that the City Council's "decisions. . . . are not supported by adequate or accurate findings . . . " and that the City "failed to proceed in a fair or equitable manner . . . " These allegations encompassed a challenge to the Council's abatement order. For whatever reason, Ghosh and his counsel chose not to assert this issue before the California courts in the first appeal. But that was Ghosh's choice, not a limitation placed on him by the courts.

This is clearly an appropriate case for application of *res judicata*.

Ghosh has failed to make the compelling showing needed to justify a writ of certiorari. His petition cites broad principles with which the City generally has no

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[3] Ghosh had an opportunity to present his argument to the City Council at its hearing on this matter on September 25, 2001, at which time asked for, and was granted, a continuance. He then failed to appear on the date of the continued hearing.

quarrel. However these principles have no application to the facts of this case, and Ghosh does not attempt to apply them to the facts.

IV

CONCLUSION

For all the foregoing reasons, the City respectfully prays that this Court deny Ghosh's petition for a writ of certiorari.

Respectfully submitted,

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